No. 91-886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BOB REVES, ROBERT H. GIBBS, and FRANCES GRAHAM,
As Representatives of a Class of Note Holders,
Petitioners,

v.

ERNST & YOUNG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

ROBERT M. WEINBERG
MARTIN S. LEDERMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

JED S. RAKOFF
MICHAEL L. WALDMAN
One New York Plaza
New York, New York 10004

LAURENCE GOLD
(Counsel of Record)
815 15th Street, N.W.
Washington, D.C. 20005
(202) 637-5340

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

Page

STATUTES

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-886

BOB REVES, ROBERT H. GIBBS, and FRANCES GRAHAM,
As Representatives of a Class of Note Holders,
Petitioners,

v.

ERNST & YOUNG,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is filed with the consent of the parties, and in support of respondent, as provided for in the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The AFL-CIO is a federation of 89 national and international unions with a total membership of approximately 14,000,000 working men and women.

Since RICO was enacted, it has been become commonplace for the participants in labor disputes to attempt to affect the balance of power through the bringing of private civil RICO suits. *See* Victoria G.T. Bassetti, Note, *Weeding RICO Out of Garden Variety Labor Disputes*, 92 Colum. L. Rev. 103, 122-23 & nn. 95-108 (1982) (enumerating at least thirteen means litigants have used to transform ordinary labor disputes into RICO suits).

In particular, employers increasingly are using § 1962(c) against unions engaged in strike activities, on the theory that a union conducting a strike against an employer is by that fact alone "associated" with the employer-enterprise, and that acts of picket-line wrongdoing are racketeering activity that constitutes "participat[ion] in the conduct" of the employer-enterprise's affairs. *See, e.g. Yellow Bus Lines, Inc. v. Drivers Local 639*, 883 F.2d 132, 141-45 (D.C. Cir. 1988), *rev'd*, 913 F.2d 948 (D.C. Cir. 1990) (en banc), *cert. denied*, —— U.S. ——, 111 S. Ct. 2839 (1991); *Overnite Transp. Co. v. Truck Drivers Local 705*, 904 F.2d 391 (7th Cir. 1990).

That broad reading of § 1962(c) "would work a major restructuring of our legal landscape," in that it would "giv[e] management a potentially powerful weapon to wield against striking workers." *Yellow Bus*, 913 F.2d at 955. *See also* Bassetti, *Weeding RICO*, 92 Colum. L. Rev. at 126 (RICO can serve as "bludgeon" in midst of labor dispute). And so read, § 1962(c) "might apply in the context of innumerable labor-management clashes," in a manner that would "reset the labor-management balance" carefully crafted in the elaborate set of statutes and regulations governing labor-management relations. *Yellow Bus*, 913 F.2d at 955.

It is against this background—and for this reason—that the AFL-CIO files this brief *amicus curiae* addressed to the proper reading of § 1962(c).

SUMMARY OF ARGUMENT

We demonstrate in this brief that 18 U.S.C. § 1962(c) has a far more limited scope within the scheme of RICO—a statute that itself has a limited scope—than petitioners and the *amici curiae* on their side recognize. It is our submission that § 1962(c) addresses a particular category of corruption of enterprises *from within*: corruption through certain patterns of criminal activity committed in the conduct of an enterprise's affairs by persons who are employed by or who are in a similar position to act on behalf of the enterprise, and who are in a position to play a part in directing the enterprise's affairs.

In showing that this understanding of the provision is correct we analyze § 1962(c)'s place within RICO's structure, the literal language of the provision, and its legislative background.

A. As we show in detail at pp. 7-10, *infra*, § 1962 states its substantive prohibitions in three separately enumerated subsections, each of which has a distinct role in advancing the overall objectives of the statute. Subsections (a) and (b) address two particular forms of the corruption of legitimate enterprises *from without*. Subsection (c) addresses a third—and a qualitatively different—form of the corruption of enterprises: the corruption of an enterprise *from within*. Each subsection was meant to complement, not to overlap, the others. Yet to read § 1962(c) as petitioners and the *amicus curiae* on their side do is to obliterate the differences in the roles of subsections (a), (b), and (c). Congress' intent, as evidenced by the structure of RICO, can be realized only if the limits on the scope of each subsection stated in that subsection are respected.

B. As we show in detail at pp. 10-18, *infra*, the words of § 1962(c) set out three discernible limits that define the essence of the provision's prohibition. First, subsection (c) contains a status requirement that is not found in subsections (a) and (b): to come within § 1962(c), a defendant must, as a threshold matter, be "*employed by or associated with*" the enterprise. Reference to standard definitions, and application of basic canons of statutory construction, establish that these words restrict § 1962(c)'s coverage to only an enterprise's employees or those who are in a similar position to act on behalf of the enterprise.

Second, based again on the standard definitions of the words used and fundamental rules of statutory construction, the phrase "*to conduct or participate, directly or indirectly, in the conduct* of the enterprise's affairs" is properly understood as requiring that the defendant have a role in *directing* the enterprise's affairs. This interpretation is in accord with the result reached by the Eighth Circuit, sitting *en banc*, in *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1008 (1983), and by the District of Columbia Circuit, sitting *en banc*, in *Yellow Bus Lines, supra.*

Third, subsection (c) also states that what is proscribed is the use of a pattern of racketeering activity to conduct the "*enterprise's* affairs." Thus, the provision does not apply to the mere use of the enterprise's resources or facilities to facilitate a defendant's conduct of his own affairs that are distinct from the enterprise's affairs.

C. As we show in detail at pp. 18-25, *infra*, the legislative history of RICO, and more particularly of § 1962, confirms the reading of § 1962(c) just outlined. Congress intended that the particular office of subsection (c) is to address the specific problem of corruption of enterprises from within, through the use of patterns of racketeering activity to conduct the affairs of enterprises.

ARGUMENT

At its core the argument of petitioners and the *amici curiae* on petitioners' side is that 18 U.S.C. § 1962(c) is a catch all for any pattern of the wrongful conduct specified in 18 U.S.C. § 1961(1) that has any effect on an enterprise and that is committed by any third party who has any relationship with the enterprise.

The foundation for that argument, on inspection, is equal parts apocalyptic rhetoric and tendentious word-splitting. What is notably absent is any recognition that § 1962(c) is one component part of an overall statute—the Racketeer Influenced and Corrupt Organizations Act of 1970 ["RICO"]—and that RICO in turn is a component part of a compendious United States Code, and of an overall legal system that includes an even more comprehensive set of state laws.

As to the rhetoric, it is sufficient that the federal and state criminal and civil laws treat with fraudulent conduct in a myriad of ways more than adequate to assure that the Republic will survive if the words of § 1962(c) are read fairly and in context rather than as if that provision were all that stood between the American people and rampant wrongdoing that is beyond legal redress.

As to the language of § 1962(c), the method of petitioners and the *amici curiae* supporting their position is to focus selectively on particular words or phrases in the provision, and to attribute to those words or phrases in isolation the broadest allowable meaning, regardless of whether that interpretation can be reconciled with the remaining language of subsection (c) or with the overall scheme of RICO's prohibitions.

In one way or another, petitioners and the *amici curiae* supporting them would have § 1962(c) read as covering any person who commits a pattern of crimes specified

in § 1961(1) that affects, or that is otherwise related to, an enterprise.

Petitioners come to this reading of § 1962(c) without committing themselves to any particular interpretation of the provision's words. Instead petitioners simply enumerate a broad array of fact situations that subsection (c) should, in their view, be found to cover. *See, e.g.*, Petitioners' Brief ["Pet. Br."] at 37-40 & n.15.[1]

The Government's brief rewrites the standard of § 1962(c) to provide for culpability whenever a defendant is shown "to have taken part in carrying out the activities of the enterprise by means of the prohibited predicate crimes." Brief for the United States as Amicus Curiae Supporting Petitioners ["Govt. Br."] at 16; *see also id.* at 21. The Government then stretches this broad standard beyond even its literal terms to cover, *inter alia*, all of the cases within the following categories: "whenever the defendant . . . uses the enterprise's resources or his association with the enterprise to facilitate his crimes; or . . . targets criminal activity so as to corrupt the enterprise's actions." *Id.* at 18.

Other of petitioners' *amici curiae* embrace the open-ended construction of § 1962(c) stated in *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981):

> We think that one conducts the activities of an enterprise through a pattern of racketeering when . . . the predicate offenses are *related to* the activities of that enterprise. [641 F.2d at 54 (emphasis added).]

[1] Petitioners would prefer that this Court leave the proper interpretation of § 1962(c) to develop on a "case-by-case basis." Pet. Br. at 41. To that end, petitioners suggest that the jury in every RICO case simply be asked whether the defendant participated in the conduct of certain of the enterprise's affairs through the specified racketeering activity, with no further elaboration of what is meant by those terms. *Id.* at 41-43.

See, e.g., Brief of *Amicus Curiae* National Association of Securities and Commercial Law Attorneys (NASCAT) in Support of Petitioners at 11-13; *see also* Brief of Amicus Curiae National Association of Insurance Commissioners in Support of Petitioners at 15 n.15 ("outsiders to the enterprise who affect its affairs may be reached under § 1962(c)").

We demonstrate in this brief that § 1962(c) has a far more limited scope within the scheme of RICO—a statute that itself has a limited scope—than petitioners and the *amici curiae* on their side recognize.

RICO as a whole deals not with repetitive criminal activity *simpliciter* but with repetitive criminal acts that constitute the means to corrupt an organization. And § 1962(c) addresses a particular category of corruption of enterprises *from within*: corruption through certain patterns of criminal activity committed in the conduct of an enterprise's affairs by persons who are employed by or who are in a similar position to act on behalf of the enterprise and who are in a position to play a part in directing the enterprise's affairs.

In showing that this understanding is correct, we first put § 1962(c) in its place within RICO's structure; we then analyze the literal language of the provision; and finally we set out its legislative background.

A. The Statutory Structure

The statutory source for the reams of RICO judicial decisions and academic, professional and lay comment is disarmingly modest. Section 1961(1) sets out a list of criminal wrongs each of which constitutes "racketeering activity." Subsections 1962(a), (b) and (c) then state the three sets of circumstances in which a "pattern of racketeering activity" constitutes a violation of the statute. Subsection 1962(d), in turn, makes it unlawful to conspire to commit a violation of subsection (a), (b) or (c).

RICO's substantive provisions on their face evince a public policy of protecting ongoing organizations from three different and specific forms of corruption accomplished through a pattern of racketeering activity.

Subsections (a) and (b) quite plainly address two particular forms of the corruption of organizations *from without*—one by means of tainted funds, and the other by means of overt criminality. Specifically, subsection (a) prohibits the use of the proceeds derived from a pattern of racketeering activity to acquire an interest in, to establish, or to operate an enterprise,[2] while subsection (b) prohibits any person from using a pattern of racketeering activity to acquire or to maintain any interest in or control of an enterprise.[3]

Thus, subsections (a) and (b) proscribe a pattern of racketeering activity conducted by persons outside the enterprise that is utilized by those persons as a means to establish, gain an interest in, or take control over, an enterprise that was not an instrumentality of the racketeering activity.

---

[2] Subsection (a) provides, in pertinent part, that it

> shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . ., to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

[3] Subsection (b) provides that it

> shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Subsection (c) addresses still a third—and a qualitatively different—form of the corruption of enterprises.[4] This subsection—on its face and, as we show below, on detailed analysis—is addressed to the corruption of an enterprise *from within*, and *not* to threats to an enterprise from the outside. In contrast to subsections (a) and (b), which deal with corrupt methods of establishing, or taking an interest in or control of an enterprise, subsection (c) deals with corrupt methods by which insiders operate an enterprise.

In drafting RICO, then, Congress has gone to the pains of stating its prohibitions in three separately enumerated subsections, each of which appears to have a distinct role, logically related to the others, in advancing an overall statutory objective. And so far as these structural clues take us, the role of each subsection is to complement, not to overlap, the others.

To read § 1962(c) as petitioners and the *amici curiae* supporting petitioners have done is to obliterate the distinct roles of subsections (a), (b), and (c). On that reading, subsection (c) certainly swallows all of subsection (b)'s prohibitions and possibly subsection (a)'s as well.[5]

---

[4] Subsection (c) provides that it

> shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[5] The predominate RICO pleading practice has been to proceed as if subsections (a), (b) and (c) were meant to overlap. Plaintiffs commonly assert multiple RICO violations—using all four subsections of § 1962(c)—arising out of a single set of facts, with numerous real and constructed enterprises alleged, so that multiple defendants can be joined and, in particular, so that defendants with substantial financial resources can be reached. "Shifting enterprise allegations for the sole purpose of targeting specific civil defendants adds to the increasingly surreal image afflicting RICO allegations." David B. Smith & Terrance G. Reed, *Civil RICO* ¶ 7.02 at 7-22.3

That result should, at the very least, raise a caution as to the construction of the subsection proffered by petitioners and their allies. As this Court recently stated in *King v. St. Vincent's Hosp.*, —— U.S. ——, ——, 112 S. Ct. 570, 574 (1991), "the meaning of statutory language, plain or not, depends on context," because

> "[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ." (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)); *see also Crandon v. United States*, 494 U.S. 152, 158 (1990).]

And, as we next show, the result petitioners seek can be reached only by failing to respect the limits on the coverage of § 1962(c) stated in the language of the provision.

B. The Language of § 1962(c)

Subsection (c), as we have noted, forbids "any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."

These words set out three discernible limits that define the essence of the subsection's particular prohibition:

(1992). *See, e.g., Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1358 (3d Cir. 1987) (chart enumerating plaintiff's six alternative theories of defendant's RICO liability, using three § 1962 subsections, several alleged enterprises, and theories of conspiracy, respondeat superior and aiding-and-abetting); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 28-29 (1st Cir. 1987) (plaintiff alleged that three defendants, and three other entities, "individually, collectively and in any combination among them, is an 'enterprise' "); *Hall American Center Assocs. Ltd. Partnership v. Dick*, 726 F. Supp. 1083, 1088-91 (E.D. Mich. 1989); *Grunwald v. Bornfreund*, 668 F. Supp. 128, 133-34 (E.D.N.Y. 1987) (five different enterprises alleged, including amorphous "association-in-fact"). *See also* Smith & Reed, *Civil RICO* ¶ 3.05 at 3-42 (describing the "protean nature of the enterprise element and the gimmickry to which RICO jurisprudence has succumbed").

§ 1962(c) applies only to (1) an enterprise's employees and those who have an equivalent status, who (2) have a role in directing the enterprise's affairs, and who (3) conduct, or participate in the conduct of, the *enterprise*'s affairs through a pattern of racketeering activity.

1. Subsection 1962(c), first of all, contains a "status" requirement that is not found in subsections (a) and (b). To fall within § 1962(c), a defendant who has committed racketeering activity must, as a threshold matter, be "*employed by*," or "*associated with*," the enterprise in question.

Webster's Third New International Dictionary identifies the relevant meaning of the verb "employ" as: "to use or engage the services of," or "to provide with a job that pays wages or a salary or with a means of earning a living." Webster's Third New Int'l Dictionary 743 (1986); *accord*, 5 The Oxford English Dictionary 190-91 (2d ed. 1989) (defining "employed" as "in (another's) employ," and in turn defining the noun "employ" as "[t]he state or fact of being employed; *esp.* that of serving an employer for wages"). *See generally Nationwide Mut. Ins. Co. v. Darden*, —— U.S. ——, 112 S. Ct. 1344 (1992).

Webster's defines the verb "associate" to mean "to join often in a loose relationship as a partner, fellow worker, colleague, friend, companion or ally[;] to come together as partners, fellow workers, colleagues, friends, companions or allies." Webster's Third New Int'l Dictionary at 132. Webster's provides the following examples for the use of the adjective form: "was associated with him in a large law firm"; "were closely associated with each other during the war." *Id.*; *accord*, 1 Oxford English Dictionary at 718 (identifying the principal meaning of "associated" as "[j]oined in companionship; united in action or purpose, sharing in dignity or office, allied"); Black's Law Dictionary 156 (4th rev. ed. 1968) ("associate" "[s]ignifies confederacy or union for a particular purpose").

Thus, on the ordinary meaning of "employed by or associated with," a defendant must be an employee of, or be otherwise allied with or a partner of, the enterprise in question in order to come within the proscriptions of § 1962(c).

Indeed, the conjunction of the phrases "employed by" and "associated with" requires that the interpretation of the latter phrase be informed by its connection in the statute to the former phrase. "The traditional canon of construction, *noscitur a sociis*, dictates that 'words grouped in a list should be given related meaning.'" *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989)).[6] "Associated with" thus must be understood to refer to some active role in the operation of the enterprise that is distinct from yet akin to employment by the enterprise.

Equally to the point, "'a court should give effect, if possible, to every clause and word of a statute.'" *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, —— U.S. ——, ——, 111 S. Ct. 1282, 1294 (1991) (quoting *Moskal v. United States*, 498 U.S. ——, ——, 111 S. Ct. 461, 466 (1990)). Accordingly, the phrase "employed by or associated with" must be read to *exclude* from the coverage of the subsection a category of persons who, in the absence of the phrase, could be said to "participate . . . in the conduct" of the enterprise's affairs, but who do *not* have the requisite relationship to the enterprise.[7]

[6] Use of this canon is particularly appropriate "where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

[7] If the racketeering activity *itself* could establish the requisite "association" with the enterprise, the "association" clause would be rendered superfluous. If § 1962(c) is construed to give effect to *all* its words, the provision "requires an association with an enterprise which is *distinct from* participation in the conduct of the enterprise through a pattern of racketeering activity." *United States v. Bledsoe*, 674 F.2d 647, 663 (8th Cir.) (emphasis added), *cert. denied*, 459 U.S. 1040 (1982). *See also* note 8, *infra*.

Specifically, the status requirement stated by the phrase "employed by or associated with" should, at a minimum, be understood to exclude from coverage an outsider *without* the appropriate status who might be said to participate in the conduct of enterprise's affairs by means of some kind of leverage or influence over the enterprise or its managers.[8] For example, the status requirement—"employed by or associated with"—should exclude from the coverage of the subsection a union representing the enterprise's employees, a business competitor of the enterprise, or the enterprise's vendors and customers, even though these entities or persons may be in a position to

[8] In this connection, petitioners argue that Congress' inclusion of bribery among the RICO predicate crimes somehow implies that a pattern of bribery by a person outside an enterprise must constitute a violation of § 1962(c) in the following respect: the briber is through his bribe participating in the conduct of the enterprise that employs the bribee. If the subsection were not so interpreted, according to petiitoners, "RICO's coverage of bribery" would be "virtually eliminate[d]." Pet. Br. at 37; *see also id.* at 37-39; Govt. Br. at 20-21.

Putting aside other defects in this logic, the simple answer is that the conduct petitioners describe might well be subject to RICO's prohibitions in ways other than that posited by petitioners. For example, if the briber participates in the conduct of the affairs of the entity that employs him through a pattern of bribery of other entities, subsection (c) would apply to his corruption of *his own* enterprise. *Cf. Yellow Bus Lines, Inc., supra*, 913 F.2d at 956 (union official may violate § 1962(c) by participating in affairs of *the union* through violence directed at employer). Or, a pattern of bribery by an outsider could violate subsection (b) if the bribes were directed at "acquir[ing] or maintain[ing] . . . any interest in or control of" the bribed enterprise. But if the statutory language is our guide the fact that a pattern of bribery is involved does not necessarily mean that a § 1962(c) violation has occurred at all, much less that a § 1962(c) violation has occurred with respect to the bribed enterprise.

Thus, petitioners' strained reading of § 1962(c) is not justified by any need to maintain the viability of "bribery" as a § 1961(1) "racketeering activity." Petitioners, for the purpose of their litigation strategy, would prefer a broader § 1962(c) than Congress wrote—one that covers bribes by outsiders to an enterprise—but that does nothing to prove that Congress wrote such a broad provision.

exercise considerable leverage or influence over how the enterprise conducts its affairs.[9]

2. Similarly, the natural meaning of the words, "*to conduct or participate, directly or indirectly, in the conduct* of [the] enterprise's affairs"—a clause that describes a second necessary element of a violation of subsection (c)—also serves to delimit the application of the provision.

Subsection (c)'s words do not proscribe *all* participation in the enterprise's affairs through a pattern of racketeering activity. Congress did *not* state that the provision applies to "any person employed by or associated with an enterprise" who "participates in the enterprise's affairs through a pattern of racketeering activity." Rather, the provision *adds* the limitation that the employee or person otherwise associated with the enterprise must engage in racketeering activity to "conduct" the affairs of the enterprise or to participate "in the conduct" of those affairs.

As is true of the word "associated," the word "conduct"—which appears in subsection (c) as both a verb

[9] For cases illustrative of these and related kinds of factual configurations, but not necessarily of the analysis set forth in text, see, e.g., *Yellow Bus Lines, supra* (union conducted adversial strike against enterprise employer); *Overnite Transp. Co. v. Truck Drivers Local 705*, 904 F.2d 391 (7th Cir. 1990) (same); *United States v. Mokol*, 957 F.2d 1410 (7th Cir. 1992) (deputy sheriff extorted payoffs from enterprise company in exchange for "protection"); *United States v. Yonan*, 800 F.2d 164 (7th Cir. 1986) (lawyer bribed employee enterprise state attorney's office to influence disposition of cases), *cert. denied*, 479 U.S. 1055 (1987); *Moffatt Enters., Inc. v. Borden, Inc.*, 763 F. Supp. 143 (W.D. Pa. 1990) (manufacturer fraudulently induced enterprise company to enter into distributorship); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 758 F. Supp. 64 (D.P.R. 1991) (broker fraudulently induced enterprise savings-and-loan to make inappropriate investments); *cf. Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3d Cir.) (litigant filed false interrogatory answers with enterprise court), *cert. denied*, 482 U.S. 915, 484 U.S. 822 (1987); *Park South Assocs. v. Fischbein*, 626 F. Supp. 1108 (S.D.N.Y.) (litigants brought abusive cases in enterprise court), *aff'd*, 800 F.2d 1128 (2d Cir. 1986).

and a noun—can bear a range of meanings, depending on its context. Used as a verb, the principal meanings are "to bring by or as if by leading: lead, guide, escort"; "to lead as a commander"; and "to have the direction of: run, manage, direct." Webster's Third New Int'l Dictionary at 474. Similarly, as a noun the word may be used synonymously with "management" or "direction," *id.* at 473, although, as petitioners and the Government emphasize, as a noun "conduct" also can be used in a broader sense to mean simply "the act, manner, or process of carrying forward," *id. See* Pet. Br. at 23 n.12, Govt. Br. at 10.

Using the broader definition, and attributing that definition to the verb form of "conduct" as well as to the noun form, § 1962(c) would read: "to carry out or participate, directly or indirectly, in the carrying out of, the enterprise's affairs."[10] This is the virtual equivalent of: "to participate, directly or indirectly, in the enterprise's affairs." Thus, that reading, by rendering the "conduct" element meaningless, contravenes fundamental principles of statutory construction. *See supra* at 12.[11] As

[10] There is no basis in the statute for concluding that Congress in drafting § 1962(c) intended a different meaning for the verb "conduct" than for the noun "conduct." As the Government correctly notes, it is appropriate here to give "conduct" a similar construction in both usages. Govt. Br. at 9.

A single, uniform construction of "conduct" is, indeed, supported by the short-form description of § 1962(c) that is contained in both the House and Senate Reports on RICO. Those reports say, simply, that "[s]ubsection (c) prohibits the conduct of the enterprise through the prohibited pattern or collection." House Comm. on the Judiciary, *Report on Organized Crime Control Act of 1970*, H. Rep. No. 1549, 91st Cong., 2d Sess. 57 (1970); Senate Comm. on the Judiciary, *Report on Organized Crime Control Act of 1969*, S. Rep. No. 617, 91st Cong., 1st Sess. 159 (1969). This sentence strongly suggests that Congress meant "conduct," used both as a verb *and* as a noun, to connote "direction," or "operation."

[11] The District of Columbia Circuit, *en banc*, has criticized one of the principal cases relied upon by petitioners for precisely this kind

the District of Columbia Circuit has pointed out, "Congress . . . did not proscribe mere *participation* in the enterprise's affairs through a pattern of racketeering activity, but rather, subjected participation *in the conduct* of an enterprise's affairs to RICO liability." *Yellow Bus Lines. Inc., supra*, 913 F.2d at 954 (emphasis in original).

Accordingly, both uses of "conduct" in § 1962(c) should be read according to the ordinary meaning of the verb "conduct," *viz.*, "management" or "direction." This is, in essence, the construction adopted by the Court of Appeals in the instant case, Joint Appendix at 275, and, sitting *en banc, in Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983):

> Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action [under § 1962(c)]. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.

Or, as the *en banc* District of Columbia Circuit put it in *Yellow Bus*:

> The "conduct of [the enterprise's] affairs" thus connotes more than just some relationship to the enterprise's activity; the phrase refers to the guidance, management, direction or other exercise of control over the course of the enterprise's activities. In order to participate in the conduct of an enterprise's affairs, then, a person must participate, to some extent, in "running the show." [913 F.2d at 954.][12]

---

of selective reading of § 1962(c)'s words. In *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986), cited favorably in Pet. Br. at 37, the Eleventh Circuit quite literally, by use of ellipsis, "omitted the word 'conduct' in its statement of section 1962(c)'s requirements." *Yellow Bus*, 913 F.2d at 954.

[12] Petitioners place great weight on the phrase "participate, directly or indirectly," which petitioners remove from its context

3. Subsection (c) states as well that what is proscribed is the use of a pattern of racketeering activity to conduct the "*enterprise's* affairs."

Thus, subsection (c) cannot fairly be read to apply to the mere use of the enterprise's resources or facilities to facilitate the defendant's *own* affairs that are distinct from the enterprise's affairs. For example, if the officer of a bank were engaged in illegal drug transactions on his own account and occasionally used his phone at the bank to conduct those transactions, he would not be conducting the *bank's* affairs through this pattern of illegal drug transactions.[13] By contrast, if the officer were using his position within the bank to operate the bank so as to provide a facility for laundering money received in drug tranasctions, he would be conducting the bank's affairs through this pattern of racketeering activity.[14]

---

within the provision. Pet. Br. at 24-27, 39-40. That phrase, however, does not alter the remaining requirements of § 1962(c). Whether "direct" or "indirect," the "participation" must be participation in the *conduct* of the enterprise's affairs, rather than simply in the enterprise's affairs without more. There is no reason to attribute any more significance to the inclusion of "indirect" in the subsection than Congress' intent to cover those persons, employed by or associated with an enterprise, who, while not formally clothed with the authority to manage the enterprise, nevertheless have that authority as a practical matter by virtue of their status. Thus, for example, a major shareholder of a corporation may not be in a formal position of management or decisionmaking, but may still "indirectly" participate in the conduct of an enterprise corporation's affairs by instructing those persons who *are* in a formal position to "conduct" the enterprise's affairs in a particular way.

[13] *Cf. United States v. Nerone*, 563 F.2d 836, 851 (7th Cir. 1977) (no culpability under § 1962(c) where defendant's illegal gambling operation merely occurred within the geographical confines of the enterprise's property), *cert. denied*, 435 U.S. 951 (1978); *United States v. Dennis*, 458 F. Supp. 197 (E.D. Mo. 1978) (no culpability under § 1962(c) where defendant used access to the enterprise's facilities as a means for collecting his own unlawful debts).

[14] *Cf. United States v. Scotto, supra*, 641 F.2d at 51 (president of enterprise union took bribes in exchange for, *inter alia*, his

C. The Legislative History

The legislative history of RICO, and more particularly, of § 1962, confirms the reading of § 1962(c) just outlined. Congress intended § 1962 to proscribe racketeering activity *to infiltrate, to gain control of, or to conduct* organizations. The particular office of subsection (c) is to address the specific problem of corruption of enterprises from within, through the use of patterns of racketeering activity to conduct the affairs of enterprises.

1. RICO Generally

S.1861, 91st Cong., 1st Sess., the "Corrupt Organizations Act of 1969," introduced by Senators McClellan and Hruska in April 1969, is, in all relevant respects, the bill that the following year became the RICO title (title IX) of the Organized Crime Control Act of 1970. The 1969 Act "in its essentials . . . was all but identical to the final version of [RICO]." Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 676-77 (1987) [hereafter "Lynch, *RICO*"]. In particular, § 1962 of S.1861 was in all material respects identical to the same provision that was enacted in RICO. Therefore, "[a] proper understanding of the goals of S.1861 . . . is particularly important in understanding the goals of RICO." Lynch, *RICO*, 87 Colum. L. Rev. at 677.

The goals of S.1861 are nowhere more evident than in the first line of the bill, which states that S.1861 is "A BILL [t]o amend title 18, United States Code, to prohibit the *infiltration or management* of legitimate organizations by racketeering activity or the proceeds of racketeering activity . . . ." (Emphasis added.) In introducing S. 1861, Senator McClellan was clear about the problem the bill was designed to address: "The problem, simply stated, is that organized crime is increasingly *taking over* organizations in our country . . . ." 115 Cong. Rec. 9567 (Sen.

---

agreement to reduce number of worker's compensation claims filed through the union), *cert. denied*, 452 U.S. 961 (1981).

McClellan) (emphasis added). The bill was intended, therefore, to attack the use of racketeering activity "in the acquisition *or operation* of business." *Id.* (emphasis added). In particular, Senator McClellan stated that § 1962 of S.1861 was intended to make it unlawful "to *acquire, control* or *operate* organizations by the use of a pattern of racketeering activity." *Id.* (emphasis added).

This concern that organized crime was "taking over" legitimate businesses and labor unions continued to dominate Congress' consideration of RICO the following year. The concern was expressed repeatedly during the debates and in the hearings before the House and Senate.[15] And this emphasis was again reflected in the House and Senate Reports on the bills that became RICO.[16]

---

[15] *See United States v. Turkette*, 452 U.S. 576, 591-92 & nn.13-14 (1981) (citing the legislative history); 116 Cong. Rec. at 585 (Sen. McClellan) (RICO drafted "to attack and to mitigate the effects of racketeer infiltration of legitimate organizations"); *id.* at 35196 (Rep. Celler) ("[t]itle IX is designed to inhibit the infiltration of legitimate business by organized crime"); *id.* at 35206 (Rep. Kleppe) (title IX covers "suppression of the infiltration of legitimate enterprises by racketeers or the proceeds of racketeering"); *id.* at 35295 (Rep. Poff) (title IX "provides the machinery whereby the infiltration of racketeers into legitimate businesses can be stopped and the process can be reversed when such infiltration does occur"); *id.* at 35304 (Rep. Railsback) ("This title is designed to deal with the infiltration of organized crime into legitimate business and labor."); *id.* at 35312 (Rep. Broomfield) (bill creates federal crime proscribing "the infiltration of legitimate enterprises by the rackets").

[16] *See* House Comm. on the Judiciary, *Report on Organized Crime Control Act of 1970*, H. Rep. No. 1549, 91st Cong., 2d Sess. 57 (1970) [hereafter "House Report"] ("Section 1962 establishes a threefold prohibition aimed at stopping the *infiltration* of racketeers *into* legitimate organizations." (Emphasis added.)); Senate Comm. on the Judiciary, *Report on Organized Crime Controls Act of 1969*, S. Rep. No. 617, 91st Cong., 1st Sess. 159 (1969) [hereinafter "Senate Report"] (same); *see also id.* at 76-78 (discussing "infiltration of legitimate businesses" and "takeover of legitimate unions").

Congress thus intended RICO to proscribe the use of racketeering (directly or by use of the proceeds derived therefrom) to become an insider in an enterprise, and the use of racketeering by those who had become insiders to run an enterprise.

2. Section 1962

The predecessor of S.1861—S.1623, 91st Cong., 1st Sess.—did not contain anything like what is found in § 1962(c). The prohibitions of S.1623 were directed solely at the investment of proceeds derived from criminal activity in legitimate enterprises. *See* 115 Cong. Rec. at 6992, 6995-96.

The Department of Justice, in remarks to the Senate, criticized S.1623 as being "deficient" in some "major respects." One of those respects was that the bill "merely prohibits the investment of prohibited funds in a business, *but fails to prohibit the control or operation of such a business* by means of prohibited racketeering activities." *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 387 (1969) (emphasis added).

In light of this criticism, Senators McClellan and Hruska introduced S.1861, *see supra* at 18. This revised bill added what we know today as §§ 1962(b) & (c), and thus addressed the Justice Department's criticism. As Professor Lynch notes, "[w]hile still serving the goal of attacking organized crime's involvement in legitimate business, section 1962(c) takes a different approach to the problem, prohibiting not the act of infiltration itself, but the criminal activities committed by the infiltrated racketeers." Lynch, *RICO*, 87 Colum. L. Rev. at 682.

This reading is confirmed by the numerous instances in the legislative history where the legislators explained *which* enterprise-related acts of racketeering would be

made unlawful under § 1962 of RICO. The "threefold standard" of prohibited activities in § 1962 is described in the House and Senate Reports as follows:

> (1) making unlawful the receipt or use of income from "racketeering activity" or its proceeds by a principal in commission of the activity to acquire an interest in or establish an enterprise engaged in interstate commerce [§ 1962(a)]; (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity," [§ 1962(b)] and (3) proscribing the *operation of any enterprise* engaged in interstate commerce through a "pattern" of "racketeering activity." [House Report at 35; Senate Report at 34 (emphasis added).]

And, as the quoted passage exemplifies, whenever a member of Congress described in shorthand form the various prohibitions of § 1962, it was with reference to the "acquisition or operation of" enterprises through racketeering activity.[17]

---

[17] *See, e.g.*, 116 Cong. Rec. at 602 (Sen. Hruska) ("Title IX of this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from *control* of legitimate businesses which have been *acquired or operated* by unlawful racketeering methods.") (emphasis added); id. at 607 (Sen. Byrd) ("to acquire an interest in businesses . . ., or to acquire or operate such businesses by racketeering methods"); id. at 36294 (Sen. McClellan) ("to acquire an interest in a business . . ., to use racketeering activities as a means of acquiring such a business, or to operate such a business by racketeering methods"); *id.* at 36296 (Sen. Dole) ("using the proceeds of racketeering activity to acquire an interest in businesses engaged in interstate commerce, or to acquire or operate such businesses by racketeering methods"); *id.* at 35191 (Rep. Sisk) (same exact language as in House Report, *see supra* at 21); *id.* at 35227 (Rep. Steiger) ("the use of specified racketeering methods to acquire or operate commercial organizations"); *cf. also, e.g., id.* at 592 (Sen. McClellan) (RICO would "forfeit the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activity"). *See also* Senate Report at 81

Congress' intent, in other words, was to bring a halt to the taking over of enterprises through racketeering activity, and as a second line of defense to bring a halt to the use of racketering activities as a means of operating such entities by those who had come to control them.[18]

Representative Celler, who was the Chairman of the House Judiciary Committee that voted out RICO in 1970, and one of the principal sponsors of the Organized Crime Control Act on the floor of the House, defined the prohibition stated in § 1962(c) this way: "The conduct of the affairs of a business by a person *acting in a managerial capacity*, through racketeering activity is . . . proscribed." 116 Cong. Rec. 35196 (emphasis added).

("Title IX attacks . . . the use of force, threats of force, enforcement of illegal debts, and corruption in the acquisition or operation of business.").

As these passages make clear, "acquisition" was the legislators' shorthand word for the problem dealt with by subsections (a) and (b), while "operation" of the enterprise was the shorthand for the problem dealt with in subsection (c).

[18] Senator Hruska explained some of the possible dangers posed when the infiltrators operate an enterprise through racketeering:

> When organized crime infiltrates a legitimate business, its whole method of operation counters our theories of free competition and acts as an illegal restraint of trade. Whether a business is purchased from funds derived from its many unlawful activities, or whether it is acquired by extortion and violence, its aim is monopoly. It employs physical brutality, fear and corruption to intimidate competitors and customers to achieve increased sales and profits. The vast economic power concentrated in this giant criminal conglomerate constitutes a dire threat to the proper functioning of our economic system. [116 Cong. Rec. at 602.]

For other examples of the way § 1962(c) might address the operation of enterprises through racketeering, see *id.* at 820 (Sen. Scott) ("title IX may be a means to excise syndicate-infiltrated businesses which use force to eliminate local competition and then charge extortion prices for staple commodities and services"); *id.* at 591 (Sen. McClellan) ("Labor unions are infiltrated, and then labor peace is sold to businesses."); Senate Report at 78 (similar).

Similarly, Senator Hruska, a principal sponsor of RICO in the Senate, stated that RICO was "designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members *from control* of legitimate businesses which have been acquired or operated by unlawful racketeering methods." *Id.* at 602 (Sen. Hruska) (emphasis added).

In addition, the Senate Report discusses at length the danger involved in the "tak[ing] over" of businesses and of unions by racketeering elements. Senate Report at 76-78. Acocrding to the Report, the forfeiture and divestiture remedies of RICO were intended to "dislodge" racketeers from enterprises that they have "acquired or *run* by defined racketeering methods." *Id.* at 79 (emphasis added).

Having drafted the prohibitory subsections of § 1962 to accomplish these expressed objectives, Congress did not intend that the provisions be applied to racketeering activity that did not fit within the statutory bounds. While the Organized Crime Control Act of 1970 was being considered, critics of the bill raised concerns that the racketeering activities were designed so broadly that RICO would reach many crimes not necessarily typical of organized crime. *See* 116 Cong. Rec. 18912-14, 18939-40. Senator McClellan reassured these critics of RICO's limitations by explaining that the critical limitation is to be found not in the § 1961(1) list of predicate crimes but in the statute's other requirements, *including the specific restrictions of § 1962*:

> The danger that commission of such offenses by other individuals would subject them to proceedings under title IX is even smaller than any such danger under title III of the 1968 act, since commission of a crime listed under title IX provides only one element of title IX's prohibitions. Unless an individual not only commits such a crime but engages in a pattern of

such violations, *and uses that pattern to obtain or operate an interest in an interstate business*, he is not made subject to proceedings under title IX. [116 Cong. Rec. 18940 (emphasis added).][19]

The interpretations of § 1962(c) proffered by petitioners and by the *amici curiae* supporting petitioners would

---

[19] An uncodified section of RICO, § 904(a), *see* P. Law 91-452, 84 Stat. 922, 947, contains a "liberal construction" clause, which states that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." For the following reasons, this "liberal construction" clause cannot properly be the basis for a broader construction of § 1962(c) than the one outlined above.

First, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), suggests that the liberal-construction clause is confined to interpretive questions posed by § 1964, RICO's civil remedy provision:

> The strict- and liberal-construction principles are not mutually exclusive; § 1961 and § *1962 can be strictly construed* without adopting that approach to § 1964(c). Indeed, *if* Congress' liberal-construction mandate is to be applied *anywhere*, it is in § 1964, where RICO's remedial purposes are most evident. [473 U.S. at 492 n.10 (citation omitted; emphasis added).]

As the passage from *Sedima* indicates, the proper principle of statutory construction for resolving any ambiguity in the meaning of § 1962(c) is not "liberal construction," but rather, the rule of lenity. The rule of lenity applies because RICO's governing standard for civil liability is set forth in a *criminal* statute. *See Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also H.J. Inc. v. Northwestern Bell Tele. Co., Inc.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws.") (citing *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954)).

In any event, as we have demonstrated in the text, when examined in the context of the statute as a whole and with regard to Congress' intent, the proper construction of § 1962(c) *can* be discerned. Use of the liberal-construction clause to go beyond what Congress intended would be inconsistent with the appropriate judicial function. As this Court has said, that clause " 'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.' " *Sedima*, 473 U.S. at 492 n.10 (citation omitted).

ignore the limitations built into that provision and thus render Senator McClellan's assurances hollow.[20]

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

ROBERT M. WEINBERG
MARTIN S. LEDERMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

JED S. RAKOFF
MICHAEL L. WALDMAN
One New York Plaza
New York, New York 10004

LAURENCE GOLD
(Counsel of Record)
815 15th Street, N.W.
Washington, D.C. 20006
(202) 637-5340

---

[20] For the reasons more fully developed in the Brief for Respondent, under the proper reading of § 1962(c), the RICO claim against respondent in this case should fail. The acts in question here were performed by respondent in its capacity as an outside, independent auditor of the alleged enterprise—the farmer's cooperative. In that capacity, respondent—by definition an independent outside entity—did not meet the status requirement of § 1962(c). Moreover, the performance of an independent outside auditor does not constitute participation in the management or direction of the enterprise being audited. The audit performed and the audit reports issued by respondent were services provided to the cooperative by a service vendor, services that by their nature could *only* be performed by an independent, outside entity, and not by the entity being audited. Respondent's work on the audit and the oral audit reports was part of the conduct of *respondent's* affairs, *not* of the cooperative's affairs. If respondent performed fraudulent independent audits, or fraudulently reported on those audits, the wrongs committed were in the conduct of respondent's *own* enterprise, *not* that of the *cooperative's* enteprise.